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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
PETITIONER

versus

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The opinions of the Court of Criminal Appeals of Alabama affirming the Appellant's convictions are reported as follows:

Mathis v. State, 52 Ala. App. 668, 296 So. 2d 755 (1973)
Mathis v. State, 52 Ala. App. 674. 296 So. 2d 760 (1973)[1]

The Supreme Court of Alabama granted the Petitioner's petitions for writs of certiorari to review the judgments and opinions of the Court of Criminal Appeals and consolidated the cases on motion of the State, but, after reviewing the briefs and hearing oral argument on the merits, the Court quashed the writs as improvidently issued. This order was issued on May 9, 1974, and is reported as follows:
Mathis v. State, 292 Ala. ——, 296 So. 2d 764 (1974).

II

JURISDICTION

The Petitioner is seeking the writ under 28 U.S.C. 1257 (3).

III

QUESTIONS PRESENTED FOR REVIEW

A

Can there be any set standards for determining when an

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[1]The two cases both concerned the obtaining of money by false pretenses from the Mobile County School Board, the defense was lack of **scienter** or criminal intent, the evidence and arguments on the matters at issue in this Honorable Court and in the Supreme Court of Alabama are identical and indeed the cases have been consolidated since the issuance of the writ by the Supreme Court of Alabama. Considerable confusion could result from referring to the cases by their identical styles and nearly identical citations. For this reason when it is necessary to refer to the separate cases in this brief they will be referred to according to the subject matter of the prosecution. Thus, the first case (52 Ala. App. 668, 296 So. 2d 755) will be referred to as the "Hurricane Camile Fraud Case", and the second (52 Ala. App. 674. 296 So. 2d 760) will be referred to as the "Kitchen Equipment Fraud Case".

accused should be granted a change of venue or a continuance because of pretrial media reporting?

B

Is there a distinction between the effect of media involvement in the judicial process by influencing the police, witnesses or jurors by disrupting the courtroom or by publishing evidence of a confidential nature prior to its revelation in open court, on the one hand and the effect of the reporting by the media of facts revealed by independent investigation, examination of public records and interviews with witnesses, on the other?

C

Does a state trial court have authority to limit the actions of the news media outside the courtroom?

D

Is an accused person deprived of due process of law when some of the veniremen from which his jury is selected have some knowledge of the case as a result of pretrial media reporting and have formed some vague opinions about the case, where the veniremen indicated an awareness that their knowledge is incomplete and probably inaccurate and there is no indication that the opinions are in any way fixed but are rather, vague feelings about the controversy?

E

Will this Honorable Court review findings of fact by State courts where such findings are made in good faith

and are based on and supported by the evidence.

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making his claim under the Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT OF THE CASE

The Petitioner was indicated by the January, 1970, session of the Grand Jury of Mobile County for obtaining money by false pretenses. There were two separate indictments charging separate fraud schemes against the Mobile County School Board. At the same time numerous other persons were indicted, including Don Pennell, the Petitioner's accomplice, who was charged with the same crimes as the Petitioner, and School Board member, William B. Crane, who was charged with misconduct in office or conflict of interest.

Prior to his trials the Petitioner moved for changes of venue, continuances, and orders "protecting the Judicial Process." This latter being a judicial order limiting the media reporting about the School Board Scandal. In support of his motions the Petitioner submitted proof that there had been a considerable amount of state-wide media reporting of alleged corruption and mismanagement in the Mobile County School Board. The reporting appeared to be accurate and objective and was based on independent examination of public records, interviews, etc. There was little if any Government involvement with the media. The object

of such editorial comment as appeared in the media was the School Board. There were no calls for arrests, indictments, or convictions, although these were reported when they occurred. The Petitioner's diligent efforts to show any prejudicial effect of the media reporting fell far short of the intended goal. On the other hand, it was proven that Mobile County had a population of over 300,000 people. It was also shown that during the period which included the trials Mobile County Juries had dealt favorably with the Petitioner. A law suit by a firm of lawyers against the Petitioner ended with a verdict in his favor. And, a suit by the Mobile County School Board for the Hurricane Camile Fraud demanding $250,000.00 (the Board, according to the evidence, paid the Petitioner at least $120,000.00 for work which was neither needed nor performed) ended in a verdict against the Petitioner for only $66,863.40. Finally, it was proven that School Board member William B. Crane had been tried by a Mobile County Jury just prior to the Petitioner's trial and had been acquited. After holding thorough hearings on the Petitioner's motions, the learned trial judge overruled them.

The Petitioner went to trial on the two indictments a year and a year and a half respectively, after the first media reporting began.

In each case the learned trial judge held thorough hearings on the qualifications of the veniremen. Each venireman was examined individually and thoroughly by the defense, and the State and, where appropriate, by the court. The veniremen evidenced a strong desire to truthfully answer questions relating to their opinions and feelings about the case. This desire was motivated, at least in part, by a wish to avoid sitting on what was expected to be a long, highly

complicated, and rather boring trial during which the jury would be sequestured.[2] These examinations revealed few, if any, strong opinions toward the Petitioner.

The examinations of the veniremen revealed that most if not all of the veniremen had been exposed to media reporting. However, the examinations indicated that the veniremen's knowledge was fragmentary and the opinions based on it vague. Time and again the defense asked the veniremen questions like: "Did you read that . . . [some fact reported by the media] . . . ?" and received a negative reply.

The learned trial judge exercised great caution on behalf of the Petitioner in ruling on challenges. Any venireman evidencing a strong opinion, whether fixed or not, was removed or challenged. Challenges were sustained to any venireman who indicated that his verdict might be effected by what he had read or heard. Any venireman who was an employee of or a close relative of an employee of the School Board was removed on challenge. One venirewoman indicated that she had some information about the case as a result of her employment with the Federal Bureau of Investigation; she stated that it would not effect her verdict but that she could not specify the nature and extent of the information. A challenge to her was sustained. In spite of the trial judge's caution only eighty-four (84) veniremen were examined to produce the venire of thirty-eight (38) persons in the Hurricane Camile Fraud Case, and fifty-five (55) were examined in the Kitchen Equipment Fraud Case to produce a venire of thirty-two (32). Of course, not all those who were excused were challenged on grounds of

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[2]This perhaps also explains what Judge Cates refers to as "equivocal answers". **Mathis v. State** 52 Ala. App. 674, 677, 296 So. 2d 760.

prejudice. Many were excused because of age, health, or peculiar inconvenience.

The examinations of the veniremen consumes 322 pages (R. pp. 214-536) of the record in the Hurricane Camile Fraud Case and 277 pages (R. pp. 125-402) of the Record in the Kitchen Equipment Fraud Case.

This is neither the time nor the place for a detailed analysis of the evidence. A State Jury, trial judge, Appellate Court and Supreme Court have examined the evidence and found it sufficient. Indeed, the evidence favoring conviction was over-whelming and the defense consisted of an ascertion of lack of *scienter* in one case and of lack of criminal intent in the other. (R. pp. 214-1941 [Hurricane Camile Fraud Case] and 403-700 [Kitchen Equipment Fraud Case].

On December 18, 1970, the Petitioner was found and adjudged guilty and sentenced to seven years imprisonment[3] in the Hurricane Camile Fraud Case. (R. pp. 61-62) And, on June 25, 1971, the Petitioner was adjudged guilty and sentenced to eight years imprisonment[4] in the Kitchen Equipment Fraud Case. (R. pp. 70-71)

Appeals to the Court of Criminal Appeals of Alabama followed. The Court of Appeals thoroughly examined the record on the various issues raised, especially those relating to pre-trial media reporting and the venire. Both cases were affirmed on August 14, 1973, (i.e. the Hurricane Camile Fraud Case) and August 28, 1973, (the Kitchen Equipment

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[3]The Petitioner was admitted to bail pending appeal and is still at large on bail. On the other hand, the Petitioner's accomplice, who received sentences totaling fifteen years has served a portion of his sentences and is free on parole.

[4]Ibid.

Fraud Case). The Court noted that the media reporting was factual, truthful and not prejudicial to the Petitioner. (52 Ala. App. 668, 674 and 52 Ala. App. 674, 677) Rehearings were sought and denied in both cases. *Mathis v. State*, 52 Ala. App. 668, 296 So. 2d 755 (1973) and *Mathis v. State*, 52 Ala. App. 674, 296 So. 2d 760 (1973).

Writs of Certiorari were sought from the Supreme Court of Alabama. The writs were issued, and the Court reviewed briefs and heard oral arguments. However, on May 9, 1974, the Supreme Court quashed the writs as improvidently issued, two justices dissented but agreed that the media reporting was objective and truthful. Rehearing was denied on July 11, 1974. *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764 (1974)

VI

SUMMARY OF THE ARGUMENT

This case presents the perennial problem of fair trial and free press.

It is impossible to establish set standards for the granting or denying of changes of venue and continuances on grounds of pre-trial publicity. Many things must be considered by the trial judge, especially the probable effectiveness of the proposed remedy. Charges of venue are of questionable value in cases where media interest has permeated the entire jurisdiction. *App. of Cohn*, (2nd Cir., 1964) 332 F. 2d 976; *United States v. Mitchell*, (S. D. N. Y., 1973) 372 F. Supp. 1239 Similarly, a continuance does little except delay the reckoning with the problem. In the instant case, the records showed the media reporting to be statewide in

scope. And, the Petitioner's trials took place a year and a year and a half after the media reporting began, yet according to the Petitioner these delays were not sufficient. There is no way to know how long a delay would remove all interest in the case. Ultimately the delay would have violated due process and justice. *Barker v. Wingo*, 407 U. S. 514 33 L. Ed 2d 101, 92 S. Ct. 2182 (1972) In the final analysis much discretion must be vested in the trial judge. *App. of Cohn*, (supra)

A distinction must be drawn between those cases where the media involves itself directly in the judicial process and endeavors to act as a direct influence thereon and those cases where the media merely reports the facts learned through its own independent efforts. In this case the media obtained information by examining public records, interview-individuals, and observing public events. The media did nothing that an ordinary citizen could not do. There were few if any calls for action of any sort and the reporting was uniformly factual and accurate.

A judicial order forbidding the reporting of facts by the media is a violation of the First Amendment of the Constitution of the United States. Mr. Justice Powell's opinion and order in *Times-Picayune Publishing Corp. v. Schuling-Kamp*, S. Ct. No. A-1305, 43 L. Wk. (Gen. Law.) Dicta in *Branzburg v. Hayes*, (408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 [1972]) possibly indicating the acceptability of such an order refers to the duty of a trial judge to regulate the courtroom and judicial officials. The trial judge's power to regulate the media is limited by the First Amendment to the courtroom and judicial officials.

It is not the having of some knowledge of the case nor

the holding of some vague feelings about the controversy which disqualifies veniremen, rather it is the holding of a strong or fixed opinion which makes a venireman unacceptable. *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 245 (1878); *Irvin v. Dowd*, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961) None of the veniremen who were accepted evidenced any strong feeling toward the Petitioner or the case.

The Petition actually seeks only the review of findings of fact made in good faith by State Court. The State Court findings are fully supported by the record and ought not be reviewed on a writ of certiorari.

VII

ARGUMENT

A

WHAT STANDARDS?

The Petitioner urges that this Honorable Court enunciate standards for the granting of motions for change of venue or continuances on the grounds of pre-trial publicity. Interestingly the Petitioner does not suggest what the standards may be. It seems to be the law that if there is any substantial publicity in a case, the accused has the right to a hearing on its effect. *Silverthorn v. United States*, (9th Cir. 1968) 400 F. 2d 627 and *Doggett v. Yeager*, (3rd Cir., 1973) 472 F. 2d 299. Of course, the Petitioner does not and cannot question the sufficiency of the hearings he was accorded on his motions in the State trial court.

However, as to the standards for the granting or deny-

ing of changes of venue or continuances, the respondent must join the Petitioner in being unable to articulate any such standards. The American Bar Associations Project on Standards for Criminal Justice, standards relating to Fair Trial and Free Press, Section 3.2 (c) reads as follows:

> "(c) Standards for granting motion.
>
> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required."

Obviously this is no set standard. It places a duty on the trial judge to determine if there is a reasonable likelihood that a fair trial cannot be had. This is probably as close to a standard as can be articulated.

Each case must turn on its own special facts. The trial judge must consider many things including: (1) The size and nature of the community where the trial is to be held. In the instant case the trial was held in an urban area of some 300,000 population. (2) The accused's position in the community prior to the case. The Petitioner was a respected business man of no particular notoriety. (3) The nature of the charge. Crimes of violence are more likely to evoke fear and anger than frauds, such as those for which the

Petitioner was indicted. (4) The nature of the publicity. In the instant case even Justice Jones who dissented in the Supreme Court of Alabama commented favorably on the accuracy and objectivity of the news reports.

Probably the most important matter which the trial judge must consider is the probable effectiveness of the proposed remedy. In earlier times a change of venue to the next county or across the state would be highly effective in eliminating the effects of publicity. However, today the media disseminates information instantly throughout a whole state and indeed throughout the nation. A change of venue would be news in the place to which the case was transferred. The media there would no doubt report the transfer together with a digest of facts reported in the original venue. As Judge Gagliardi noted in denying a change of venue in the Mitchell-Stans trial:

> "Indisputably, this case will attract publicity wherever tried; the granting of an application for a change of venue merely creates the further risks of producing a cause celebre in the new venue." *United States v. Mitchell* (S.D.N.Y., 1973) 372 F. Supp. 1239, 1261.

Judge Gagliardi relied on the second circuit's decision in *Application of Cohn*, wherein Judge Moore wrote:

> "Even as the effect, if any, of publicity upon the prospective jury cannot be presently ascertained, so also is the benefit, if any, of a change of venue beclouded with uncertainty. To remove the trial of a highly publicized case (to accept petitioner's argument) to a small community outside of the City of New York would tend to focus the spotlight more

> brightly upon the case. Modern means of news communication have taken away many of the reasons for the transfer of the cause celebre which may have existed fifty years ago." App. of Cohn (2nd Cir., 1964) 332 F. 2d 976, 977.

Thus, the change of venue once justly regarded as a panacea for pre-trial publicity appears to be of doubtful value today. Rather than solve the problem, a change of venue may well only take it elsewhere.

In the instant case the Petitioner's evidence shows that the reporting of the School Board Scandal and the Petitioner's relation to it was state-wide in extent. One whole volume of the Petitioner's exhibits consisted of clippings from the Birmingham, Alabama, newspapers. Birmingham is 236 miles from Mobile. If the case attracted that much attention in Birmingham, it takes little imagination to estimate the publicity which would have attended a change of venue to that city. It is rather apparent that a change of venue in these cases would have been an exercise in futility.

A continuance, also sought by the Petitioner, presents similar problems of effectiveness. In the first place, the instant cases were tried a year and a year and a half after the media first began to report on the School Board Scandal. Yet, the Petitioner claims that this was not sufficiently long to dissipate the effect of the publicity. How long a delay would dissipate the effect? Two years? Five years?

As a change of venue tends to take the problem from one place to another, so continuance because of pre-trial publicity would tend only to prolong the problem. Each time the trial date approached the media would report the fact together with a review of earlier stories. This would tend to revive

whatever prejudice had previously existed. And, how long would it be before the accused began complaining that he was being denied a speedy trial? Thus, the continuance approach to the problem would soon tend to become in itself a violation of due process to the accused, as well as of society's right to speedy and certain justice. See *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972)

Another, remedy sought by the Petitioner was an order limiting the reporting of the matter by the media. As will be discussed below such an order would no doubt have been both ineffective and unconstitutional.

Another remedy, not sought by the Petitioner, but which should be given some consideration because of the certainty of its application and its obvious effectiveness is suggested by Section 3.3 of the Standards Relating to Fair Trial and Free Press of the American Bar Association's Project on Standards for Criminal Justice. This is a waiver of trial by jury by the accused. There would be no doubt as to when such a remedy would apply; it would apply whenever the accused asked for it. And, the effectiveness of such a remedy is obvious. However, in the instant case the Petitioner never indicated an interest in waiving trial by jury.

From what has been written it seems obvious that there are no set standards for the granting or denying of motions for changes of venue or continuances because of pre-trial publicity. Much discretion must be placed in the trial judge. *Application of Cohn* (2nd Cir. 1964) 332 F. 2d 976. And, it is obvious that the learned trial judge in this case acted well within his discretion.

B

MEDIA INVOLVEMENT IN THE JUDICIAL PROCESS VS. MERE REPORTING

Logically, the mere existance of pre-trial media reporting cannot in itself work a denial of due process. Rather it is the effect of the publicity in creating bias which causes the possible denial of due process. Yet, this Honorable Court has in several cases indicated that under certain circumstances it is unnecessary to show the effect of the publicity. These cases include *Rideau v. Louisiana*, (373 U.S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 [1963]; *Estes v. Texas*, (381 U.S. 582, 14 L. Ed. 2d 543, 85 S. Ct. 1628 [1965]), and *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966), all cited by the Petitioner. Each of these cases, however, involved more than the mere reporting by the media; they each involved efforts by the media to involve itself directly in the judicial process.

The respondent respectfully submits that if this Honorable Court held that it was unnecessary in these cases to show the effect of the media activities, it was because the effect was immediately apparent. It was not mere reporting of facts by the media that was condemned in these cases, but the direct involvement of the media in the judicial process. A newspaper can no more deprive a person of due process than a steel mill or a service station can. It is Government and government officials who must grant and may deny due process. In each of the three cases cited above it is the actions or omissions of government officials that lie at the basis of the reversal. That is, the sheriff's participation in the interview in *Rideau*, the trial court's allowing the television camera into the courtroom in *Estes* and the whole

criminal justice system gleefully joining in the media witch hunt in *Sheppard*. The respondent respectfully submits that where the media only reports facts developed by its own investigation, examination of public records, and observations of public events and in no wise involves itself in or attempts to influence the judicial system, then the effect of the publicity must be shown before a denial of due process can be claimed.

In the instant case the media's activities were all independent of the judicial system. To obtain its information the media did nothing that any citizen could not do. The media presented few if any calls for action of any sort. The reports were uniformly factual and accurate. The victim of the Petitioner's crime, i.e. the School Board, was more the object of media concern than the Petitioner. The Petitioner's diligent efforts to show that the media reporting had created strong prejudice against him in Mobile County failed utterly. Since the diligence of Petitioner's counsel is above reproach, it must be assumed that such failure was due to the lack of prejudice in the community against the Petitioner.

C

A STATE COURT MAY NOT REGULATE MEDIA OUTSIDE THE COURTROOM

In the State trial and appellate courts and here the Petitioner has claimed that the learned trial judge should have issued an order "protecting the judicial process". The Petitioner moved for such an order in each case. (R. pp. 19-22 in both cases) Apparently, the trial judge ruled on neither motion. This was no doubt an oversight. The Petitioner filed a veritable blizzard of motions in the trial court and hearings were held on most of them. Apparently, the Pe-

titioner never called these particular motions to the trial judge's attention. Since there was no ruling on these motions it would appear that they present nothing for review.

However, since the apparent object of the motions was the suppression of the news media, it is obvious that the orders should have been denied.

In the first place such an order would be utterly ineffective. The media would have only switch from straight reporting to the publishing of inuendos. And, even if the media fully complied with the letter and spirit of such an order, which is unlikely, the community would soon turn to rumors and gossip to fill the vacuum created by the order. It would be impossible to identify such rumors or to measure their effect. And, rumors would appear to be more harmful to the process than factual reporting.

A more important matter is the fact that such an order would have been repugnant to the Constitution of the United States. It is difficult to imagine what the First Amendment protects if it does not protect the dissemination of news of public affairs. Recently in a criminal prosecution which occasioned considerable media coverage, a Louisiana trial judge issued an order limiting media reporting in the case. One newspaper brought the matter to the attention of the Federal Courts. The District Court and a panel of the United States Court of Appea'ls for the Fifth Circuit refused to relieve the newspaper of the order. However, Mr. Justice Powell of this Honorable Court, sitting as a Circuit Justice for the Fifth Circuit, issued a stay of the State Court order *pendente lite* on July 29, 1974. *Times-Picayune Publishing Corp. v. Schulingkamp*, S. Ct. No. A-1305, 43 L. Wk. (Gen. Law) 2046 Mr. Justice Powell in issuing the stay order

indicated a strong belief that the order was in violation of the First Amendment.

Admittedly, there appears certain dicta in *Branzburg v. Hayes*, (408 U.S. 665, 685, 33 L. Ed. 2d 626, 641, 92 S. Ct. 2646 [1972]) which could be construed as permitting such orders. However, this language was addressed to the proposition that the First Amendment grants no special privileges to the media beyond those held by others, and that, therefore, a trial court could control reporters in the courtroom as it controls others. This conclusion is strengthened by Mr. Justice White's quotation from *Sheppard v. Maxwell*[5] which immediately follows the language. The language quoted from *Sheppard* relates to the failure of the trial court to control the media representatives *in the courtroom* and the court officials and police in giving information to the press. It is obvious that a court may and must control the courtroom and the activities of court officials. But, the First Amendment forbids the extension of this authority to the activities of private persons and institutions outside of the courtroom.

In the instant case, the activities of the media were independent of the judicial officials. Leaks were hardly necessary to the media, the entire case centered on public records. There was no search and seizure, confession, or confidential police investigation. Indeed the record indicates that there was no police investigation at all. There is no indication of any impropriety by the media within the courtroom or out. It must be remembered that the three courts which have examined this case thus far, including the dissenters in the Supreme Court of Alabama, have had only favorable comments on the media's performance in this case.

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[5]384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966).

D

THE VENIREMEN EVIDENCED NO FIXED OPINIONS

In his dissenting opinion in the Supreme Court of Alabama Mr. Justice Jones quotes a portion of the testimony of Venireman Luther James, Jr. *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764, 769 (1974). The choice of James is fortunate for several reasons. First, he was typical of the veniremen in both trials. His testimony, like the others shows some knowledge of the School Board Scandal. He knew that the case involved fraud, although this knowledge seemed to come primarily from the trial court's reading of the indictment. (R. p. 299) But, his knowledge was fragmentary; he did not know, for example, until he was informed by defense counsel, that the Petitioner was charged with the same crimes for which Don Pennell had been convicted. (R. p. 291) He evidences no strong feelings about the case. Because, Mr. Justice Jones mentions James' testimony in his dissent and because it is so typical of the others, the Respondent State submits the entire examination of Luther James, Jr., as appendix "A" to this brief.[6]

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[6]This examination should prove helpful to this Honorable Court in other ways. Its length and thoroughness demonstrates the exhaustive nature of the examinations allowed by the trial judge. Mr. James' cander demonstrates the universal honesty of the veniremen. The examination contains as an exhibit one of the newspaper articles which the Petitioner finds so offensive; this Honorable Court can judge the article for itself. Finally, it will be noted that the learned trial judge first overruled a defense challenge to Mr. James (R. p. 298), then tentatively sustained a defense challenge (R. p. 300) and finally overruled the challenge (R. p. 301). Thus, Mr. James' is a border line case and as such provides a valuable insight into the unarticulated standards which Judge Bolling used in ruling on challenges.

The Petitioner complains that many of the veniremen in these cases knew something about the case. He suggest that putting him to trial before such a venire was a denial of due process. This is not the law, nor has it ever been the law. Two hundred years ago Chief Justice John Marshall sitting as a circuit judge on the trial of Arron Burr observed:

> "[L]ight impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, *constitute no sufficient objection to a juror;* but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." Quoted with approval in *Reynolds v. United States*, 98 U.S. 145, 155, 25 L. Ed. 245, 246 (1878) (Emphasis supplied)

The necessity of accepting veniremen who have some knowledge of a case has increased over the years rather than decreased. As Mr. Justice Clark observed in *Irvin v. Dowd*, 366 U.S. 717, 722-723, 6 L. Ed. 2d 751, 756, 81 S. Ct. 1639 (1961). It is not the knowledge of some of the facts nor the holding of some slight opinion which disqualifies a venireman. Indeed, the fact that the accused was indicted may cause some adverse opinions. Rather, it is holding of a fixed opinion which disqualifies a venireman.

Consider the examination of Luther James, Jr., Appendix "A". Does this examination reveal a hint of a fixed or even strong opinion? The Petitioner objected to Mr. James because the man honestly admitted that he could not swear that there was no possibility that what he had heard

about the case would effect him *subconsciously* during the trial. This, says the Petitioner (and Mr. Justice Jones agreed) was sufficient to challenge him for cause. Now, who can honestly swear what subconscious influences are presently acting on him, to say nothing about future possibilities? Yet, the learned trial judge indicated a willingness to sustain a challenge to Mr. James at least at one point. Of course, the Petitioner argues that a change of venue should have been granted him. But, as pointed out above, it is doubtful that a change of venue would have been of much help.

In the final analysis, while the veniremen in those cases indicated some fragmentary knowledge of the School Board Scandal, there was no indication of any strong feelings among those selected and certainly no fixed opinion.

E

THE PETITIONER URGES THIS HONORABLE COURT TO REVIEW FINDINGS OF FACT

As the Petitioner recognizes, his Petition seeks only the review of findings of facts. He argues that this should not deter this Honorable Court. The Petitioner asserts that this Honorable Court has on occasions in the past reviewed findings of fact by state courts.

It is obvious that the Alabama Courts in this case applied the law as announced by this Honorable Court. The cases cited by the Petitioner all involve situations where State Courts gave lip service to the constitution and made findings utterly unsupported by the evidence, indeed findings that flew in the face of the evidence. Eg. *Norris v. Alabama*, 294 U.S. 587, 79 L. Ed. 1075 (1934) This is simply not the

case here. Mr. Justice Jones cites a portion of the examination of Luther James, Jr., as proof that the media reporting in this case created prejudices toward the Petitioner. The transcript of Mr. James' testimony is presented this Honorable Court as Appendix "A" to this brief. The Respondent state respectfully submits that an examination of this transcript will reveal no strong feelings about the case and certainly no fixed opinion. The media reporting was reviewed by the State courts and universally found to be objective in nature. Even the dissenters in the Supreme Court of Alabama agreed with the Court of Criminal Appeals finding that "the reporting was more or less objective". *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764, 769.

What this case presents then is findings of fact based squarely on the evidence. Such good faith findings of fact ought not be reviewed by this Honorable Court on a writ of certiorari.

VIII

CONCLUSION

The Petitioner urges the issuance of the writ, asserting that this case provides this Honorable Court with the opportunity to establish standards for the granting and denying of changes of venue and continuances because of pre-trial publicity. Yet, the Petitioner suggests no such standards, and it is impossible to define any set standards. Rather, this matter must be decided on a case by case basis. For this reason broad discretion must be vested in the trial judge. The learned trial judge in this case exercised his discretion with great caution and in a manner favorable to the Petitioner. The state appellate courts reviewed the record and universally agreed that the media reporting was "in no wise"

prejudicial to the Petitioner. The State of Alabama respectfully submits that the Petition seeks nothing except a further review of findings of fact. And, the state of Alabama, therefore, respectfully prays that the writ be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

JOSEPH G. L. MARSTON, III
Assistant Attorney General

APPENDIX A

THE EXAMINATION OF
LUTHER JAMES, JR., VENIREMAN
RECORD PAGES 289-309
(HURRICANE CAMILLE FRAUD CASE)

Messrs. Binder and Deniston for the defense

Messrs. Booth and Loveless for the State

* * * * * *

THEREUPON:

LUTHER JAMES, JR.

was called as a witness, and having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and

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testified as follows:

EXAMINATION BY MR. BINDER:

Q Mr. James, would you tell His Honor where you are employed?

A International Paper.

Q What is your occupation there?

A Electrician.

Q Do you recall this Mathis story and all the articles that have, at various and sundry times, been composed in the Mobile Press Register since a year ago, headlines, occasional stories? You were aware that there is a so-called alleged scandal in the School Board, you have seen that?

A Yes, sir.

Q And you have been exposed to it on the T.V. haven't you?

A Yes, sir.

Q And you have been exposed to it on the radio, haven't you?

A Yes, sir.

Q I heard a radio broadcast this morning about this case. You have heard similar broadcasts about the facts of the case, haven't you?

A Yes, sir.

Q Now, I appreciate your being so honest and candid with me and I would like to go into this: Sometime back, there was a trial in this county regarding a man named Don Pennell. Do you recall that big trial?

A Yes, sir.

Q And do you recall reading in your newspaper the accounting of the trial as it came down every day in the headlines?

A Yes, sir.

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Q And do you recall that Mr. Pennell was convicted?

A Yes, sir.

Q And do you recall that he was incarcerated in a prison in Alabama?

A Yes, sir.

Q And you have been reminded time and time again, have you not, sir, that Mr. Mathis is charged with the same crime? You would say to me, would you, that along with the Pennell case each day, as the Reporting came forward, Mr. Mathis' name was prominently mentioned, was it not?

A Yes, sir; I didn't know it was the same charge.

Q But, I am telling you today it is the same charge and I want you to know that. From what you have said you know some of the facts of the Pennell case, do you not? You have read it?

A Yes; I have read it.

Q And the truth of the matter is that you don't remember every detail of those facts today, do you?

A No, sir.

Q But, you read them at one time?

A Right.

Q And this morning in the December 7 issue of the newspaper on the front page of it?

MR. DENNISTON: December 8th.

MR. BINDER: Excuse me, well I am in the wrong pew, December 8th paper, on the December 8th paper, you read here on the front page where the ten possible jurors were selected for the trial.

THE WITNESS: I believe I read that in last night's paper.

BY MR. BINDER:

Q All right sir, and this morning you told me before that you had read the paper this morning, is that true?

A I had read a paper I should have said, I don't know

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whether it was this morning or last night.

Q Let me show you some of the pages of the December 8th paper?

A I did not read that; no, sir.

Q But, you did read the article, "Ten possible Jurors selected for trial"?

A Yes,

Q Now, you knew that you were one, and I would like to introduce this into evidence as soon as we cut it out?

THE COURT: Mark it in, Mr. Reporter.

(Thereupon the Court Reporter marked Defendant's Exhibit No. 1 into evidence.)

MR. BINDER: Your Honor, since this has been offered into evidence, I am not sure what sort of lettering or numbering system we will have, but some procedure is going to have to be worked out to keep these things straight.

THE COURT: The Reporter will take care of that.

BY MR. BINDER:

Q Now Mr. James, you have also read these articles as they have come down that show that Mr. Mathis is charged with other matters, have you not?

A I don't recall.

Q You don't recall?

A No, sir.

Q I ask you whether or you you have any children in school?

A Yes, sir.

Q How many, please, sir?

A Three.

Q And what schools are they in?

A Forest Hill and Shaw High School, Forest Hill [cont. p. 296]

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* * * * * *

DEFENDANT'S EXHIBIT NUMBER ONE

FOR

JURY QUALIFICATION

* * * * * *

MOBILE REGISTER

MOBILE, ALABAMA TUESDAY MORNING,

DECEMBER 8, 1970

* * * * * *

OF B.H. MATHIS

10 POSSIBLE JURORS SELECTED FOR TRIAL

By Bill Sellers, Register Staff Reporter

Only 10 prospective jurors were qualified Monday following a penetrating examination of an 84-member venire

called for the false pretense trial of contractor B. H. (Bud) Mathis in Mobile Circuit Court.

Three of the jurors were successfully challenged by the defense during the first round of an intense jury qualification process which is to continue Tuesday — and possibly longer.

Judge William D. Bolling, in an unusual move for Mobile, has agreed to allow the State and defense to examine prospective jurors in panels of 12 and even individually in order to determine if any prejudices or other disqualifying factors exist.

Only the first of seven panels had been examined when the overnight recess was called shortly before 6 p.m. Monday. Two jurors on the first panel had been dismissed due to possibly prejudicial knowledge of the case and a third juror had been dismissed in general questioning of the entire venire earlier on grounds of his age, it being 66.

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When Bolling called the recess, defense attorneys filed a motion for a mistrial on grounds that those jurors who had not been closely examined had not been instructed by the Court to avoid reading or listening to news accounts of the Mathis trial.

Another ground for mistrial cited by the defense was the lack of a guideline order from Bolling concerning news media coverage of the trial.

The defense has repeatedly asked that some coverage guidelines be established by the Court and Bolling had indicated he might issue some news media instructions on this point.

However, no guidelines had been set by the Court Monday afternoon.

Bolling denied the mistrial motion and called for exami-

nation of the second panel of jurors to begin at 9 a.m. Tuesday.

After all 84 prospective jurors have been examined and qualified, with many more expected to be dismissed from further service in the Mathis case during the process, an unannounced number of those remaining will then be struck by state and defense in order to arrive at the trial jury.

Bolling said Monday that two alternates will serve along with the regular 12 jurors in what is expected to be a marathon trial of Mathis on a charge of obtaining some $102,000 in school funds through false pretense.

The charge stems from a cost-plus contract Mathis had with the Mobile County School Board in 1969 for repair of schools damaged by Hurricane Camille.

A total of 247 witnesses have been subpoenaed in the case,

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142 by the state and 105 by the defense.

Three principal state witnesses failed to respond to a lengthy roll-call of witnesses Monday and Bolling granted a state motion to issue instant subpoenaes for subcontractors M. E. Orso, Markward Reynolds and C. G. Pierre.

During the jury qualification process, which began in mid-afternoon after court officials had been in recess Monday morning to attend the funeral of Asst. District Atty. Sydney Pfleger, the defense concentrated on determining the extent of prospective jurors' knowledge of the facts in the Mathis case.

Bolling allowed virtually unlimited questioning on knowledge of the case, possible prejudice, acquaintance with any witnesses or principals as the defense in particular moved toward a goal of finding "a juror free from taint."

But Bolling blocked defense questions concerning possibly hardships arising from the likely length of the trial. He

said such matters were strictly within the realm of the court's discretion.

* * * * * *

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elementary and Shaw High School.

Q And I ask you whether or not your wife is a member of the P.T.A. of those schools?

A Yes, sir.

Q And are you?

A Yes, sir.

Q And is it true that both of you go to the P. T. A. meetings?

A Occasionally.

Q I ask you whether or not you have heard the facts of this case and the matters that could come up in this trial discussed at the P.T.A. meetings when this thing first broke loose in the County? Isn't it true that it was discussed?

A I wasn't there.

Q Have you or your wife ever talked to one another about this matter?

A Yes, sir.

Q And would I be fair in saying to you that as parents of children you were concerned about the situation and as taxpayers of this county?

A Yes, sir.

Q And particularly you were concerned because your trade is that of a similar business in the contracting field, you are an electrician and you have been in the business, I am sure, a number of years, haven't you?

A Fifteen.

Q And the fact that it involves contractors and subcontractors, electricians and plumbers and what have you, would make it of even more interest to you, would it not?

A Possibly.

Q Now, do you belong to a union?

A Yes, sir.

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Q And it is the IBEW?

A Yes, sir.

Q You work under an IBEW contract at International Paper?

A Yes, sir.

Q And is this a current contract or has it just been renewed or is it about to go about?

A It is current, 1970.

Q And goes through 1970?

A Started 1970.

Q So, you are in no dispute with your employer at all?

A No, sir.

Q Now, I am concerned as Counsel for Mr. Mathis, Mr. James, with the fact that you know some of the facts of this case, and I want to explain my next question to you and I am saying this to you with all due sincerity. I am concerned with the fact that if you were selected as a juror in this case, that perhaps in the next two or three days you might be sitting here as a Juror and something might come from the witness stand that might correlate in your mind and in your subconscious mind some of those facts you previously read about in this case. That is what I am concerned about.

Now, I am concerned, and I ask you: You can't assure this Court, can you, that if you sat on this Jury and something was said from the stand there that you previously read about in the headlines, that it wouldn't strike a bell and influence you in some manner, you can't promise us that, can you?

A Honestly, I probably couldn't, subsconsciously, it would probably have an effect, subconsciously.

Q And when you promised and when you swear, you are

telling this Court and me that you are going to try to do the best you can in an unbiased fashion, aren't you?

A Yes, sir.

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Q But, you can't tell me beyond a doubt that something you might hear in this case in some fashion might correlate with something you have talked with your wife about or something you have said or read in the paper, that is about the truth of it. isn't it?

A Yes, sir.

MR. BINDER: We ask that the witness be excused, Your Honor.

THE COURT: Do you have any questions, Mr. Loveless?

MR. LOVELESS: I don't think he has gone far enough yet on grounds for cause. We are talking about terms of might and subconsciously.

MR. BINDER: These terms might be unknowledgeable to this District Attorney, but if he would read the cases, he would know what I am talking about. I feel that the witness has been truthful, Your Honor.

MR. LOVELESS: But, something that might effect his subconscious.

THE COURT: As to his not being able to guarantee that something might happen, I am going to overrule your challenge.

MR. BINDER: To which the defense excepts.

BY MR. BINDER:

Q Now, how many articles would you submit, Mr. James that you read about this case, could you even estimate it? Would you say there were more than a hundred or two hundred that came forth in the past year?

A I wouldn't estimate.

Q If I told you that we have seven volumes of news-

paper articles up here, would you tell me that possibly that was true, you wouldn't deny it, would you?

A I couldn't deny it.

Q And would you tell me that, as you have in the past

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on the stand, that you read a considerable amount of these articles?

A Yes, sir.

Q Would you tell me what you think Mr. Mathis is charged with?

A Fraud.

Q Fraud?

A Yes, sir.

Q And would you tell me, do you know anything else that is involved?

A No, sir.

Q And would you tell His Honor what does that fraud consist of as you have understood it from the newspaper, what facts?

A From what His Honor read yesterday, the only reports — or this morning rather — he was charging for work not being done.

Q And isn't that what the newspaper told you, too?

A Yes, sir.

Q And didn't you read it?

A Oh, yes.

Q And didn't you read various and sundry subcontractors' testimony in the newspaper about what they had done?

A Right.

Q And you have said to the Court and you can't tell us that may not have an effect on you, you can't say that, can you?

A No, sir.

Q In other words, you are going to do your best, if you are chosen as a Juror, to be impartial and you swear to tell the truth, but you don't mean to imply that when you read or when you heard some of the testimony from someone and you had heard some testimony or read some testimony before about that in the Pennell

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trial, you are not telling us that wouldn't have an effect on you? Isn't that what you are saying?

A Let's put it this way: I will be honest with you. there is a possibility.

Q I want to thank you for being honest about it. You are trying to answer my questions truthfully and you have now told this Judge that there is a possibility that your knowledge would have an effect on you if you were a Juror, wouldn't it?

A Yes, sir.

MR. BINDER: Now, Your Honor, what do I have to do?

THE COURT: I think I am going to sustain the challenge.

MR. LOVELESS: Your Honor, I don't believe that possibility is sufficient under our law. That is all he has developed in that there is a possibility. There is a possibility that the world is going to come to an end tomorrow, but it is just not sufficient. On a possibility, we are not going to get any Jurors in Mobile County.

THE COURT: I think anything is possible. I think that is possible that the witness may dream of the case tonight and might have a dream containing some facts that would possibly influence his verdict. I am going to stick to my procedure and I am going to ask him under oath. . .

MR. BINDER: You just sustained my challenge. Are you going to take it back?

THE COURT: I didn't rule firmly, I denied your challenge a minute ago and I was tentatively sustaining it. The District Attorney has pulled me back. I am going to ask this witness under oath to answer yes or no to this question: In your best judgment, would you be influenced in arriving at a verdict in this case by matters that you have read in the paper?

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THE WITNESS: No, sir.

THE COURT: In your best judgment, would you be influenced in this case by anything you have heard outside of this Courtroom?

THE WITNESS: No sir.

THE COURT: I am going to deny the challenge.

BY MR. BINDER:

Q Now Mr. James, I know that you answered those questions truthfully, but what the Judge didn't ask you and I asked you once, and what you have sworn to twice heretofore was this: I asked you whether the articles that you have read about the witnesses in the Pennell trial, if brought to your recollection from the stand, would have an influence on you and you testified that there was a possibility to that. Now, I didn't ask you, like the District Attorney was talking about a minute ago, of whether or not you may have heard that the world would come to an end and the Judge said, well you may have a dream at night about it. I asked you and you answered affirmatively, the truth, that the matters you have read in the newspaper regarding the Pennell case, and the things that happened thereafter, if those same witnesses came in this trial, you have told me that there is a possibility that that might have an influence on you, haven't

you? That is what you have told me on two previous occasions and you are trying to tell me the truth and I believe you. Now, isn't that your testimony?

A Well, you stated that if something came up in this trial later on. . .

Q Yes; later on.

A That would refer my memory back to something I read a year ago, that was my impression that I would recall that.

Q That is right, and you told me that it might influence you in some manner in this trial as a Juror?

A Well, let me back up there?

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Q Yes.

A I don't believe that it would actually influence my opinion.

Q You would try not to let it bother you?

A right.

Q But, you can't assure me absolutely that you would remain a fair and impartial Juror with all the facts that have been presented to you?

A Could anybody?

Q Well, I am asking you the questions. Now, I want to, I will rephrase it this way and I want to explain to you something: I have, as the defense counsel, no objection to you as a person, I have never seen you before in my life, but the law, I want you to understand this as a witness and then I want to ask you a question, the law provides for Mr. Mathis a Juror who is free from knowledge of the case and you have testified you have some definite knowledge about the case. This, the law gives me the right to ask you whether or not this knowledge might effect you, if your memory was recalled and you favored me with the truth that if some

evidence came from the witness stand and you happened to be selected as a Juror, you don't know whether that evidence from the stand would effect you or not, really, do you, you can't tell because you have been exposed to so much of this case, wouldn't you say?

A Well, I would say that I would use my utmost judgment.

Q Do the best you can?

A Right.

Q Allright, and I believe that you would. I believe you are a man of your word, but you can't give me that absolute assurance of impartiality because you know too many facts about the case, don't you? In short, wouldn't you feel a little uncomfortable with the rest of the Jurors since you do know so much about it?

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A I don't know whether I know any of the facts reading newspaper accounts aren't facts as such.

Q And you don't think they have had any impression on you and your wife and all the talking you have done about this case?

A Well, there has been talk and everybody has an opinion.

Q They do?

A Well, sure they do.

Q What is your opinion?

A I don't think it should be expressed.

Q I think it should be. Let me get something straight, we are talking to you. . .

THE COURT: If you have an opinion, I think you should tell that opinion.

THE WITNESS: I don't have an opinion as to guilty or anything.

BY MR. BINDER:

Q What is your opinion, before the Judge asked you to. . .

A I think it was a bad thing for something like this to even come up to start with for anybody, regardless of what it was for on the School Board or what have you.

Q And wouldn't you agree as a citizen of this community that it was a sorry day in Mobile when you heard about all this and it had an effect on you, didn't it?

A Sure it was.

Q And you have never seen so much publicity in all your life in anything in this city or Mobile, have you?

A Possibly not.

Q I have been told that, I don't know. And you have never seen any other matters receive so much attention, twelve months worth as this has? Let the Record show that he nooded his head in

(304)

assent. Before you were served as a Juror, you felt that it was a sorry mess, a bad situation, didn't you?

A Oh, yes.

Q And as you read all this testimony that came through the newspaper with little children, and I have got some, you were particularly interested, weren't you?

A Sure.

Q And you and your wife got an opinion, don't you. You had that opinion before you got in the Jury Box?

A Let me state this, Mr. Binder.

Q Yes.

A. I said I used the word, "Opinion" loosely, not really, I didn't really have an opinion as to the man's guilty or innocence. Let's make that clear.

Q You had an opinion though, as to all the facts surrounding the matter, the elected fraud?

A Well. . .

Q Would you go with me that far?

A I don't quite. . .

Q You had an opinion as to the entire situation and . . .

A The opinion was this, it was a big mess.

Q And wasn't that. . .

A That was what I was getting at a while ago as far as opinion.

Q Now, as the facts came down to you in the Pennell case and you read daily the witnesses statement and you found that a Jury in this county convicted Pennell and, if you will sent him to prison, didn't that opinion of the entire situation sort of fix in your mind then as to the rest of the defendants in this so-called mess? Aren't you a normal, reasonable man and when you saw that happen, what effect did that have on you, what did you feel then?

(305)

A Well, I, it is true I wondered how it would effect the other people, the other defendants.

Q And you wondered, yourself, how it would effect the other defendants and at that time you hadn't even been selected as a proposed Juror, had you?

A No, sir

Q When were you served with process in the case as a proposed Juror?

A Possibly two weeks ago.

Q Now, during the last two weeks, did you read the newspaper articles concerning Mathis?

A To my knowledge, I only read one that come up with the trial was coming up.

the School Board scandals or mess?

A Yes, sir.

Q And do you remember their names?

A There was a Mr. Crane, Mr. Smith and Mr. Pennell that I recall.

Q Mr. Crane, Mr. Smith and Mr. Pennell?

A Yes, sir.

Q And you remember that because you read the newspapers, didn't you?

A Yes, sir.

Q And do you know where those men work or are employed of anything? You don't know?

A No, sir; Mr. Pennell was with the School Board, I think, I don't know.

Q Now, you were served as a Juror about two weeks ago and I am going to show you a headline of your newspaper here December 2 and ask you whether or not you have ever seen this headline, "Judge Bolling rules against Mathis venue change"? Have you

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ever seen that?

A I don't recall that.

Q This is a Wednesday headline. You don't recall that?

A No, sir.

Q All right, sir, Mr. James, how many things has Mr. Mathis been involved in that you know about that you have heard about?

A That I know about?

Q Or have heard about, read about?

A I only, the only one I think I know anything about is a contractor, is that what you are talking about, a contractor?

Q Yes.

A A contractor.

Q Do you remember reading headlines where Mr. Mathis

Q Did you know that there were other men involved in has been sued in any civil suits, big headlines about a bank?

A I don't remember the details.

Q But, you remember hearing about it or seeing it?

A Yes, sir.

Q Did you say yes to that?

A Yes, sir.

Q All right now, do you take any interest in politics, Mr. James?

A Very little.

Q Do you recall that there was a political campaign in this country?

A Yes, sir.

Q And it was just over with not too long ago, wasn't it?

A Yes.

Q Do you recall seeing any paid-for political ads very large in number, by two attorneys running for office, one against the other, using Mathis' name in those articles like they didn't know

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of him, didn't represent him, didn't have anything else to do with him? I cite you one as Mr. Marr, a lawyer here in the City, do you remember those ads?

A No, sir.

Q You didn't see them?

A I don't remember.

Q Do you remember seeing them and not reading what was in them?

A No, sir.

Q All right, do you remember any articles regarding Mr. Mathis in the newspaper this past year whatsoever that didn't have anything to do with this case, just talking about him? Do you remember seeing any at all?

A Yes, sir.

Q What I am talking about . . .

A That he is a Democratic . . .

Q Nominee?

A Nominee for something.

Q You read all that stuff?

A I remember he was running for office, I can't remember the exact office right now.

Q And you remember what happened to him in the newspaper?

A No, sir.

Q But, you read all that stuff?

A I read some of it.

Q And you can't assure me, can you, whether the intent exposure that you have had to all this publicity won't affect you somewhere along down the line in this trial? I will give it to you another way, I will withdraw that question. Mr. James, have you, if you were Mr. Mathis, if you were him and you knew as much about this case and you knew as much as you know, would you want

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Mr. Mathis to sit on this Jury?

A If he has the integrity I do, I wouldn't mind it.

Q You have integrity?

A I would say this: I would give him an honest opinion of what is put on the table.

Q But, you can't assure me, you don't know what is in your subconscious mind, do you? See, the issue here, Mr. James, is how much do you know about this case and the issue is that this man is entitled to people to judge him that are free from any prejudice, that are free of the knowledge of the case and we are trying to find twelve good men and true in this County that haven't read all this stuff and couldn't have had any effect on them. Can you tell me, with what all you know, having small children, having discussed it with your

wife, having said everything that you have said today, that you can assure me that the facts won't have an effect on you in all fairness?

A No, sir; I don't believe the facts would have any effect, I don't believe they would.

MR. BINDER: We say, under the rule, that we have met the test, under the law, for challenge every step of the way and we call upon the Court now to challenge.

THE COURT: Motion denied. Do you have any questions, Mr. Loveless?

* * * * * *

EXAMINATION BY MR. LOVELESS:

Q You said earlier in your testimony that, of course, the effect of this thing disturbed you. Was it that such a thing could happen, was that disturbing to you, or was it the fact that it was brought to light?

A Well, that it would happen.

MR LOVELESS: That it would happen. No further questions.

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THE COURT: All right Mr. James, when you go back into the Jury Room, do not discuss anything about what you said or anything about the case, just talk about football and anything you want to, but not about this case here.

THE WITNESS: All right, sir.

* * * * * * * * * * *

CERTIFICATE OF SERVICE

I, Joseph G. L. Marfston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this ___ day of November, 1974, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on each of the Attorneys for the Petitioner, by mailing the same to them, first class postage prepaid, and addressed to them as follows:

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